Random Thoughts on Evidence in Arbitration

Arbitration and the Rules of Evidence

As a general rule, the formal rules of evidence used in courts are not followed in labor arbitration. There are a variety of reasons for this. Not all arbitrators are lawyers. Not all advocates are lawyers. Labor arbitration evolved as a less formal alternative to the court system.

That said, a central purpose of the rules of evidence is to provide for an orderly and fair hearing and ensure that the evidence admitted is reliable and relevant. Put another way, the rules help determine (1) what evidence is admitted, and (2) what weight the evidence should be given. For that reason, it pays to have at least a passing familiarity with the rules.

Even if your arbitrator does not apply the rules strictly, the intent of the rules will likely be followed, and you should expect the arbitrator to apply the rules as she/he feels is appropriate to the case.

Admissibility of Evidence

Though labor arbitrators generally admit more evidence than would be admitted in a court, there is a range among arbitrators in deciding what to admit.

On one end of the spectrum are arbitrators who take a stricter approach. They limit what is admitted to evidence that is reliable and relevant. This helps keep the record clean and makes the hearing process more efficient.

At the other end are those arbitrators who tend to be much more open in admitting evidence. They do so in an effort to avoid interfering with the parties' case presentations. They also do so because they want to avoid the risk of excluding evidence that might later turn out to be important.

Relevance is a critical factor. Relevant evidence is information that tends to support an element of the claim or defense, or said differently, tends to make a fact more probable than not.

David W. Stiteler
Arbitrator
d.w.stiteler@comcast.net
503.949.5681

"For What It's Worth" Evidence

Arbitrators, particularly those who are less restrictive in admitting evidence, may accept evidence "for what it's worth." Even if you are the beneficiary of such a ruling, that poses a problem for you because it provides no guidance at all about what the arbitrator thinks the evidence is worth.

Will the arbitrator give it meaningful weight, or discount it completely? As an advocate, you are left wondering how much, if at all, you can rely on such evidence to support your claim or defense. In such cases, it would be prudent not to count on such evidence to make your case.

Laying a Foundation for the Introduction of Documents

As with the application of the rules of evidence and admissibility issues, arbitrators take a variety of different approaches on this subject. Some require advocates to go through the whole formal routine of authenticating a document as a condition of admitting it as evidence. Others are of the view that, absent a valid basis to object to the authenticity of a document, such formality unnecessarily complicates and prolongs the hearing.

Since you may not know which camp your arbitrator is in until the hearing is underway, it is useful to have a general understanding of how to lay a proper foundation to introduce a document. The basic steps include giving the document to the witness, asking the witness to identify it, ask questions necessary to show how it is relevant to the issue (e.g., a copy of the grievant's timecard in an overtime dispute), and if needed, ask questions to establish that the document is authentic.

Issues with Testimonial Evidence

Understand what a leading question is–one which suggests the answer you want–and avoid asking questions in that manner, especially during direct examination and on key disputed matters. Leading questions may be allowed and useful, however, on cross-examination.

Listen to the witness's answer. All too often, advocates are focusing mentally on the next question they intend to ask and so fail to register that the witness says something unexpected and for which they did not prepare.

It is generally not appropriate to ask a witness to speculate about something. The arbitration process is to bring out the facts and asking a witness to speculate does not advance that purpose.

David W. Stiteler
Arbitrator
d.w.stiteler@comcast.net
503.949.5681

Privileges: it is helpful to be familiar with the more common ones, such as lawyer-client, doctor-patient, and spousal. Avoid having to rely on evidence subject to a privilege because it is likely that it will be excluded.

Hearsay

Hearsay is information that is not from a witness's personal knowledge, but which is nonetheless offered to prove the underlying fact. As an example, the issue is whether Dan left work early. Pat testifies that Al told him he saw Dan leave work early. Dan testifies and denies the charge. Al is either not present or will not be called to testify and cannot be asked about what he saw or reported to Pat.

Among the problems with hearsay are that there is no way to determine if Pat is accurately relaying the information he got from Al and there is no way to determine the credibility/reliability of what Al relayed because he is not present to be examined and cross-examined.

Types of Evidence

There are two main types of evidence: direct and circumstantial. Evidence may come in several forms: testimony from witnesses, written documents, physical objects, and demonstrative (e.g., site visits, photographs, charts).

Direct evidence tends to address a point in a straightforward manner. Testimony provides information about what the witness knows regarding an issue, and also may provide a foundation for other direct objective evidence. Other objective evidence provides necessary information, corroboration, and context.

Circumstantial evidence does not address a point directly. Instead, it provides a basis for an inference that a particular point is true.

Depending on the issue, circumstantial evidence may be given more weight than direct evidence.

Other Avenues of Evidence

Stipulations: parties may agree in writing (stipulate) to basic facts about a case. It is an efficient way to get that evidence in the record without having to waste hearing time introducing it.

Arbitral notice: parties may request that an arbitrator take notice of a well-established or readily verifiable fact (or an arbitrator may decide to do so on her/his own). For information that is clear and incontrovertible, this too is a more efficient way to get evidence into the record.

David W. Stiteler
Arbitrator
d.w.stiteler@comcast.net
503.949.5681

Inferences: though strictly speaking not evidence, arbitrators may draw inferences that carry similar weight to evidence that is admitted. Examples include a party's failure to call an eyewitness to a disputed incident even though the witness is available to testify, or failure to produce a document that is central to the disputed issue.

Witness Testimony

On direct examination, every question you ask should have a purpose in telling the story you want to tell and leading the arbitrator to the conclusion you want.

On cross-examination, keep these three considerations in mind. Don't ask a question if you don't know the answer. Don't try to make your case on cross-examination. Don't give the witness another chance to undermine your case if it's clear they will not change their story. Focus cross on the three Cs-clarify (the witness's testimony if doing so will help your case), complete (the witness's testimony if they have left out crucial information), and contradict (the witness's testimony if you have information to do it with).

Expert Witnesses v. Witnesses

Witnesses testify about what they know, or have seen, or have heard, or otherwise have personal knowledge of regarding an issue. Ordinary witnesses typically are not allowed to offer opinions about or draw inferences from other information beyond their personal knowledge.

Expert witnesses, on the other hand, are expected to offer opinions or draw conclusions based on information in the record. For an expert witness to be able to offer opinion testimony, a party must lay the proper foundation by asking questions that establish the expert's credentials and substantiate their knowledge.

Objections

While you don't need to be a lawyer, it may help to be familiar with the most common objections that will come up in arbitration. Among them are that the question is leading, irrelevant, assumes facts not in evidence, calls for speculation/conclusion, is hearsay, is outside the scope of direct/cross, is argumentative, is a compound question, the document speaks for itself, no foundation, and that it concerns an offer of settlement.

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Arbitrator
d.w.stiteler@comcast.net
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As an advocate, keep in mind that the arbitrator's goal is to gather all the evidence she/he needs to decide the issue in the case. Technical objections get in the way of that goal, so be mindful about not elevating process over substance.

Evidence Issues in Discipline Cases

Evidence about prior misconduct: if no discipline was imposed, it is likely not admissible; if discipline was imposed and not grieved, it likely will be admitted and given weight, assuming it is a similar type of misconduct.

After-acquired evidence (information discovered after the discipline but before the arbitration): whether it is admissible depends on the arbitrator, who will consider the reason it was not discovered earlier, whether the union and/or grievant has been unfairly surprised (may lead to postponement), and what purpose it is being offered for.

Post-discipline conduct evidence: this may be evidence of post-discipline misconduct by grievant or evidence of positive actions by grievant (going through a drug rehab program after being discharged for a positive drug test at work). Arbitrators vary on allowing such evidence. It may depend on how closely it relates to the initial misconduct, and if admitted, it may be considered only in the context of the appropriate remedy.

Evidence Issues in Contract Interpretation Cases

Evidence regarding one party's intent about a particular contract provision is generally not admissible where it is inconsistent with the express language in the contract and where that intent was not communicated to the other party at the time the agreement was bargained.

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Arbitrator
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